

# Civil procedure

Citation for published version (APA):

van Rhee, C. H. (2000). Civil procedure: An academic subject? In D. Heirbaut, & D. Lambrecht (Eds.), *The Use of Legal History in the Teaching of Contemporary Law* (1 ed., pp. 67-77). Wetenschappelijk Comité Rechtsgeschiedenis Koninklijke Academie van Wetenschappen van België voor wetenschappen en kunsten.

## Document status and date:

Published: 01/01/2000

## Document Version:

Publisher's PDF, also known as Version of record

## Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
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C.H. van Rhee, 'Civil Procedure: An Academic Subject?', in: D. Heirbaut, D. Lambrecht (eds.), *The Use of Legal History in the Teaching of Contemporary Law*, Brussels, 2000, p. 67-77.

## CIVIL PROCEDURE: AN ACADEMIC SUBJECT?

C.H. van Rhee\*

### 1 Introduction

Whether procedure is a necessary part of legal education at the university is open to debate. Nevertheless, this subject is currently being taught at most European law faculties. Even in England, where procedure has long been absent at the university, steps are being taken for its introduction as a compulsory university course.<sup>1</sup> This does not mean, however, that procedure occupies an unchallenged position in the university curriculum. Recently, Austrian students claimed that university courses in procedure should be abolished. In their opinion these courses did not add anything to their academic education.<sup>2</sup> The precise reasons underlying the Austrian claim are not known to me, but they may be related to the fact that courses in procedure can easily “degenerate” into a detailed study of mere technicalities such as time limits and the precise contents of procedural documents. In my opinion, if procedure is being taught in this manner, it can rightly be claimed that it is not an academic subject. The teaching of procedure in great detail can better be left to training programmes for those who intend to pursue a career as a judge or legal counsel. Since in most countries such training programmes comprise courses in procedure, university courses on the subject which merely focus on technicalities may be regarded as an unnecessary “doubleure”. Additionally, it needs to be stressed that the university is not the best place for teaching procedure in detail, since university students often lack the opportunity to get the practical training necessary to understand all the ins and outs of procedure. However, in saying this I do not wish to plead for the abolition of procedure in law faculties. I am convinced that courses on this subject can be taught in an academic manner. Academic courses in procedure are a necessary part of the education of every lawyer since knowledge of adjective law is crucial for a proper understanding of what may be called “the life of the law”. It should be remembered that procedure is not a neutral subject. On the contrary, it does have a considerable impact on substantive law. It not only is a *conditio sine qua non* for the application of substantive law in practice, but it also influences substantive law to a large extent.<sup>3</sup> What I do want to suggest, however, is that some adjustments in the teaching of procedure might be necessary in order to avoid teaching unduly technical details which are better taught in practice. In this paper I shall concentrate on *civil* procedure since this is the subject most familiar to me. I shall especially discuss the role of legal history in academic courses on civil procedure; after all, the theme of today's conference is the role of legal history in respect to the teaching of modern law. Before concentrating on this issue, however, I will shortly discuss the following preliminary question: To what extent should procedural technicalities be taught at university?

### 2 Technicalities

It is obvious that technicalities have to be part of every university course in procedure. A meaningful academic discussion on procedural issues is not possible if the participants in the discussion do not have some minimal knowledge of them. The number of technicalities taught should, however, be limited. In my opinion, students need to be familiarised with the core rules of procedure which shed some light on more general issues like the fundamental principles of procedure, leaving aside obscure details. The precise contents of the summons, for example, do not need to be taught in detail at university, but the role of this document in respect of the principle of bilateral hearing (*audite et alteram partem*) merits

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\* I would like to thank David Sellar (Edinburgh University) for his comments on an earlier draft of this paper.

1. E.J.H. Schrage, *Nedergedaald ter helle. Onderwijs in het procesrecht in de zestiende eeuw*, in B.C.M. Jacobs, E.C. Coppens (ed.), *Een Rijk Gerecht. Opstellen aangeboden aan prof. mr. P.L. Nève*, Nijmegen 1998, p. 366-367. It should be noted, however, that the subject has long been taught in law faculties in Scotland (a mixed legal system).

2. Schrage, *Nedergedaald*, p. 366.

3. Cf. P.A. Stein, *Compendium burgerlijk procesrecht*, Deventer 1997<sup>11</sup>, p. 3-4. See also R.C. van Caenegem, *History of European Civil Procedure*, in M. Cappelletti (ed.), *International Encyclopedia of Comparative Law XVI* (Civil Procedure), Tübingen [etc.] 1973, p. 4.

academic discussion.<sup>4</sup> This approach guarantees that procedure is studied from a meaningful perspective. It will prevent the common complaint that studying procedure is like learning a telephone directory by heart. Additionally, it will prevent students who will never be professionally involved in litigation having to study a subject which does not add anything to their academic legal education. The exact time limits in which appeal has to be lodged, for example, is superfluous knowledge for such lawyers; the purposes of appeal, on the contrary, are of interest even to those who will never be involved in litigation. After all, the possibility of appeal is one of the corner stones of most of our modern legal systems in that it offers litigants protection against faulty decisions.

A more global approach to procedure at university ensures that students acquire an overall impression of the different types of litigation and enforcement available in their system and/or in other systems. Those students who need a more detailed knowledge of procedure in their professional life can easily acquire it afterwards as part of a vocational training programme. At university, it might also be a good idea to offer such students an optional moot court programme. Such a programme would be a much better approach to procedure than offering a traditional course in procedure. In a moot court setting students will actively deal with the course materials and will therefore be better able to memorise the sometimes rather abstract procedural rules. However, in this paper I will not discuss the advantages of mootings any further. I will return to the procedural issues which in my opinion should be taught to all students as part of a compulsory university course in procedure.

### **3 An academic approach to civil procedure: the role of legal history**

#### **3.1 Two important questions**

The intensity of historical continuity sets the law of procedure apart from substantive law. Continuity is not as evident in substantive law as in the field of procedure, at least on the continent of Western Europe. In the area of procedure, on the other hand, we encounter to a certain extent a situation comparable to that of the common law jurisdictions in the fields of both substantive and procedural law. The law in these jurisdictions has been described as a “seamless web”,<sup>5</sup> denoting that it has known an almost organic development without sudden changes. The result of this development is that legal history is also relevant to practising English lawyers; in the area of property law, for example, they must have some knowledge of feudal law in order to understand the present system with its notion of “estates”. Since the development of continental civil procedure may, for the above reasons, also be characterised as a seamless web, one would expect continental lawyers to take an interest in legal history when studying procedural issues. It would not come as a surprise if they started to look in the past, beyond their codifications of civil procedure. Additionally, it would be quite natural if part of the teaching of civil procedure at law faculties were devoted to legal history. However, the history of procedure has never been given the attention it deserves. Practising lawyers do not show much interest in this subject, and academics (with a few exceptions) exhibit the same attitude. Most legal historians at the various law faculties in Europe seem to focus mainly on the history of substantive law and on “external legal history”. Of course, nobody would deny the importance of these subjects, but one wonders why the most historic part of our law, i.e. civil procedure, attracts little or no attention. In part, this lack of attention may be explained by the fact that in university circles (the places best suited for the study of the historical development of procedure) this subject is often looked at with disdain. Procedure is considered to be a subject unworthy of academic attention. In France, for example, we find the teaching of procedure at some universities assigned to the junior law professor for lack of other candidates willing to teach the subject.<sup>6</sup> The negative image of procedure is also reflected by the fact that in the

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4. On the origins of the principle of bilateral hearing, see L.M. Coenraad, *Het beginsel van hoor en wederhoor in het Romeinse procesrecht*, Rotterdam 2000.

5. R.C. van Caenegem, *Judges, Legislators and Professors. Chapters in European Legal History*, Cambridge 1998, p.

6. Maitland used the expression “seamless web” in his memorable epigram: “All history is but a seamless web; and he who endeavours to tell but a piece of it must feel that his first sentence tears the fabric” (see R.W. Millar (ed.), *A History of Continental Civil Procedure* (The Continental Legal History Series 7), London 1928, p. IX).

6. J. Vincent, S. Guinchard, *Procédure civile*, Paris 1996<sup>24</sup>, p. 3: “Ne raconte-t-on pas aussi que dans certaines Facultés [...] les cours de procédure sont confiés, faute de spécialistes, au dernier arrivant, un peu comme une punition, en tout cas un purgatoire en attendant d'accéder au paradis des disciplines précitées?”

Netherlands, for example, universities have not found it necessary to appoint a full-time professor of civil procedure. Professors of civil procedure at Dutch universities have many other tasks. These may be academic, for example, acting also as professor of substantive private law,<sup>7</sup> or may involve further tasks outside the university. This situation does not contribute to the academic esteem in which procedure is held. In such an atmosphere it is not a surprise that the history of procedure is not studied as enthusiastically as it deserves. An additional result of this situation is the absence of a body of literature dealing with the history of procedure. Of course, here and there specialist articles have been published, but a general handbook or general articles on this issue are still largely absent. The contribution of R.C. van Caenegem to the *Encyclopaedia of Comparative Law*<sup>8</sup> is one of the rare “recent” (1971/73) texts which can be used for educational purposes. For the rest one is mainly dependent on German treatises dating from the 19th and early 20th centuries,<sup>9</sup> one of the few exceptions from another country being the thoroughly academic Dutch handbook of R. van Boneval Faure (published at the threshold of the 20th century).<sup>10</sup> Apart from the low esteem in which procedure is held, lack of teaching materials may be another reason why the history of procedure is sparingly taught at universities. That this situation should be changed is at once apparent if one tries to answer the following questions concerning procedure:

1. What are the reasons underlying the slow pace of civil litigation in many countries?;
2. To what extent is harmonisation of civil procedure in Europe a feasible option?

These questions, which are highly relevant to every modern lawyer and which, therefore, should be part of every university course in procedure, cannot be answered without knowledge of the history of procedure. In the following sections I hope to demonstrate this thesis.

### **3.2 What are the reasons underlying the slow pace of civil litigation in many countries?**

The twelfth century witnessed the birth of the “mother of procedures” on the European continent, i.e. the Romano-canonical procedure. This procedure was first applied in ecclesiastical courts, but later it also influenced the procedure of lay courts, especially those on the continent of Western Europe and in Scotland. The basic pattern of most continental procedures can already be found in thirteenth century treatises on procedure, notably in William Durantis' *Speculum Judiciale*, written between 1271–1276. It is true that from time to time new manners of proceeding were invented for particular types of cases, but these new methods of litigation can in most instances be regarded as variations of the procedure discussed by Durantis and his fellow proceduralists. Even the disappearance of the *ancien régime* as a result of the French Revolution (1789) did not change this situation: a short experiment abolishing nearly all rules of procedure led to such chaos that the pre-revolutionary rules of procedure – based on the *Ordonnance sur la réformation de la justice* of 1667 – were quickly reintroduced.<sup>11</sup> The 1667 *Ordonnance* did, according to Van Caenegem, not mean a “great innovation in the principles of civil procedure”. Van Caenegem states that the 1667 Ordinance “was the ordered completion of a long development rather than an innovation”.<sup>12</sup> Since many of the rules of this ordinance were incorporated in the *Code de procédure civile* of 1806,<sup>13</sup> a direct line may be drawn from the 1806 Code down to the Middle Ages. Since the 1806 Code forms the basis of modern civil procedure in many countries on the European continent (e.g. Belgium and the Netherlands), the above observations are also relevant outside France. This is especially true for the Netherlands, where procedure has very strong ties with the past: unlike Belgium and France, this country did not witness a new codification of its civil procedure after the introduction of the 1838 procedural code. The latter code was to a large extent a translation of the

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7. This is the case at several Dutch law faculties.

8. Van Caenegem, *History*.

9. E.g. M.A. von Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung* (6 vols.), Bonn 1864–1874 (reprint Aalen 1959); A. Engelmann, *Civilprozess – Geschichte und System* (3 vols.), Breslau 1889–1901. Extracts in English from Engelmann's work may be found in volume VII of the *Continental Legal History Series*, which also contains further interesting materials on the history of continental civil procedure.

10. *Het Nederlandsche burgerlijk procesrecht* (5 vols.), Leiden (1st ed. 1871–1899).

11. Van Caenegem, *History*, p. 89.

12. Van Caenegem, *History*, p. 61.

14. R.C. van Caenegem, *An Historical Introduction to Private Law*, Cambridge 1996, p. 10.

French 1806 *Code de Procédure Civile*. Although from time to time the code has been changed partially,<sup>14</sup> nevertheless many articles in the present code are still a translation of the original French articles. Therefore, the history of the French code and its antecedents (e.g. the Romano-canonical procedure) is relevant for a Dutch proceduralist.

In the light of the above, it is obvious that a study of the historical development of the Romano-canonical procedure will reveal much relevant information about our modern procedure. Firstly, it will show us the enormous leap forward in procedural thinking which was caused by the introduction of the new procedure. This is obvious when contrasting the original indigenous system of procedure with the Romano-canonical rules. Among the many advantages of the Romano-canonical procedure over the indigenous procedure are the rationality of the new procedure (ordeals, for example, were definitively put to rest) and the legal certainty to which it gave rise. These and many other advantages were, however, not introduced without a price. Although at the introduction of the Romano-canonical procedure slowness may not have been a feature of this system – according to Linda Fowler, the new procedure was originally more expeditious than the old procedure it replaced<sup>15</sup> – complaints about the lack of expedition in trying cases have been voiced from an early moment in its history. Attempts to shorten the proceedings have also been present for a long time. An early example of such attempts is the decretal *Saepe* (1312–1314) of Pope Clement V.<sup>16</sup> This decretal introduced a more succinct method of proceeding for certain types of cases. The new “summary” procedure had an oral character as opposed to the ordinary method of proceeding, which was written. Later reforms in the area of civil procedure in different countries aimed at adapting the procedure of the decretal *Saepe* in order to make it suitable for general application. These reforms were, however, unsuccessful, most likely because the oral element of the original summary procedure had to give way to documents.<sup>17</sup>

I believe it is important to study such attempts to shorten the length of the proceedings as part of a university course. It will make students aware of the fact that the present complaints about procedure are not new. Students may ask themselves whether or not the deficiencies of our modern procedure are linked to the existing method of litigation. After all, most of the reforms which have been introduced over approximately eight centuries have been a failure. It would be worthwhile to investigate the reasons for the failure. From such study it would quickly become evident that, for example, the introduction of strict time-limits has never been the solution for the existing problems. Likewise too much faith in the willingness of the actors involved in the litigation process (judges, legal counsel and parties) to solve the problems is also unjustified.<sup>18</sup> This may be related to the fact that our present system of procedure aims to serve certain goals which cannot be reconciled with a speedy decision of cases. The Romano-canonical procedure and the procedures based on it are designed to reach just and equitable decisions based on the truth. For this reason both parties are given equal opportunities to be heard by the judge. As a result, our procedures have traditionally been very much concerned with having the opposing party make his appearance in court. In the 15th and 16th century Great Council of Malines, for example, a defaulting defendant had in most cases to be summoned for four times before the court would continue

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14. See C.J.J.C. van Nispen, *De terloopse hercodificatie van ons burgerlijk procesrecht*, Deventer 1993. Currently a legislative proposal (26 855) is pending in order to introduce changes in the Code of Civil Procedure. According to some authors, these changes do not satisfy the needs of our modern times. They are of the opinion that the code should be changed more drastically (cf. W.D.H. Asser, J.B.M. Vranken, *Verantwoordelijk procederen. Gedachten over een fundamentele vernieuwing van het burgerlijk procesrecht*, The Hague 1999 (Procesrechtelijke Reeks Nederlandse vereniging voor procesrecht 11)). See also J.B.M. Vranken a.o., *Oproep voor een beter nieuw civiel procesrecht*, *Nederlands Juristenblad* 1999, p. 1963–1964.

15. L. Fowler-Magerl, *Ordines iudicarii and Libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century)* (Typologie des sources du Moyen Âge occidental, fasc. 63 A-III.1\*), Turnhout 1994, p. 26–27.

16. c. 2 Clem. V, 11.

17. Cf. my inaugural lecture *Adam, ubi es? Het burgerlijk procesrecht als juridische wetenschap met Europese allure*, Maastricht 1999, p. 23–24. A translation (with some adaptations) of this lecture will shortly be published in the *European Review of Private Law*.

18. See my *De traagheid van de civiele procedure: een eeuwenoud fenomeen*, in B.C.M. Jacobs (ed.), *De rechtspraktijk in beeld. Van Justinianus tot de Duitse bezetting* (Handelingen van het XIVde Belgisch-Nederlands Rechtshistorisch Congres), Tilburg 1997, p. 57ff.

the hearing of the case.<sup>19</sup> Also in the area of proof, slowness seems to have been the price to be paid for just and equitable decisions based on the truth. Although modern lawyers may decide that the old system of legal proof, according to which each piece of evidence was assigned a fixed value, did not increase the likelihood that indeed one would arrive at the truth, its overriding purpose was objectivity. It was a reaction against the irrational methods of proof of earlier periods.<sup>20</sup> The thorough investigation to which it gave rise may, however, not have been a stimulus for expedition. The search for just and equitable decisions based on the truth also gave rise to slowness because it supported the view that much freedom had to be left to the parties as regards the manner in which they litigated. In this area we meet two fundamental principles of civil procedure which, like the principle of bilateral hearing, were not distinguished as such by early lawyers. Nevertheless, it appears that the ideas underlying these principles were present in their minds. I am of course referring to the principles of party control over allegations and proof (*Verhandlungsmaxime*) and party control over the subject matter (*Dispositionsmaxime*). The first principle determines that the scope and content of the judicial controversy have to be defined by the parties or, conversely, that the court is restricted to a consideration of what the parties have put before it.<sup>21</sup> The second principle implies that no party vested with a right of civil action is compelled to sue and that no official will do it in his place. Equally it is for the defendant to say whether or not he will assert his defence or any part of it, the taking of the sundry procedural steps being the party's own option.<sup>22</sup> Although the origins of these principles have to be studied in further detail,<sup>23</sup> they may possibly be found in pre-Romano-canonical practice.<sup>24</sup> It is, for example, striking that in early practice the parties had to take the initiative to bring an action both in criminal and in civil litigation. In the area of criminal law this has changed due to the introduction of the inquisitorial procedure,<sup>25</sup> but as regards civil procedure the parties remained *domini litis*.

Today the legacy of the past is still alive. Reaching just and equitable decisions based on the truth continues to be one of the aims of modern procedure. As a result the principle of bilateral hearing is omnipotent. In the area of proof procedure still aims at establishing the truth (be it the truth of the parties or the objective truth) although the rules governing proof have changed considerably. Nevertheless, proof proceedings continue to be very thorough and may be time consuming. Furthermore, the *Verhandlungs-* and *Dispositionsmaximen* still dominate in civil procedure to a considerable extent, although every now and then the specific role of the judge and the parties in civil litigation comes under discussion.<sup>26</sup> As a result of these and many other features, procedure continues to be time consuming and it remains unclear how expedition may be improved. In academic courses on civil procedure, it would be worthwhile to discuss whether in the light of past experiences increasing expedition is possible within the framework of the current law. If the answer is negative, one could continue by evaluating the alternatives which are currently being discussed in some countries. Again, this should be done in the light of legal history. Existing rules should in my opinion not be discarded too quickly. A thorough evaluation of the role of these rules in the light of the objectives of civil procedure would be of benefit to the decision about whether or not changes should be introduced. Rules which may seem antiquated may nevertheless play a significant role in safeguarding the litigants against unfair

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19. C.H. van Rhee, *Litigation and Legislation. Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522–1559)*, Brussels 1997, p. 289ff.

20. On legal proof see e.g. J.-Ph. Lévy, *La hiérarchie des preuves dans le droit savant du Moyen-Âge depuis la renaissance du droit romain jusqu'à la fin du XIVe siècle*, Paris 1939.

21. R.W. Millar, The Formative Principles of Civil Procedure, in R.W. Millar (ed.), *A History of Continental Civil Procedure* (The Continental Legal History Series 7), London 1928, p. 11; R.C. van Caenegem, *History*, p. 14.

22. R.W. Millar, *The Formative Principles*, p. 14; R.C. van Caenegem, *History*, p. 14.

23. The starting point for such study must undoubtedly be J.M.J. Chorus, *De lijdelijkheid van de rechter. Historie van een begrip*, Deventer 1987.

24. Van Caenegem, *History*, p. 14, lists these principles under the heading of "Conservative Elements".

25. On this subject e.g. M. van de Vrugt, *Aengaende criminele saken. Drie hoofdstukken uit de geschiedenis van het strafrecht* (Rechtshistorische Cahiers 4), Deventer 1982, p. 4ff.

26. See e.g. A.F.M. Brenninkmeijer, *Burgerlijk procesrecht als publiekrecht*, Zwolle 1993. For further information on this subject one may consult W.D.H. Asser, J.B.M. Vranken, *Verantwoordelijk procederen. Gedachten over een fundamentele vernieuwing van het burgerlijk procesrecht*, The Hague 1999 (Procesrechtelijke Reeks Nederlandse Vereniging voor Procesrecht 11).

decisions.<sup>27</sup> One should continually ask whether alternatives to the present rules contain the same or similar safeguards; or do they increase efficiency by sacrificing these safeguards in part or completely? And if indeed the new alternatives do offer litigants fewer guarantees, is this a bad development? Does the inquiry into the truth in each and every case have to be as thorough as in the Romano-canonical procedure and the various national procedures based on it? Or should, for example, a balance be struck between the need for accuracy in a particular case on the one hand and the cost and time necessary to reach this goal on the other?<sup>28</sup> And is the present role of the parties in litigation sacrosanct, or should the powers of the judge be increased? Probably one of the main reasons why past reforms of procedure have not been successful is that there has rarely been an attempt to seriously re-evaluate these issues. Only in England and Wales, a jurisdiction where the Romano-canonical procedure has never reigned as supremely as on the continent, it has finally been realised that a change in exactly these areas of procedure is indeed necessary (albeit not on the basis of a critical analysis of past experiences).<sup>29</sup> This is shown by the reforms in civil procedure introduced in April 1999. In England, the directive powers of the judge have been increased, and in the area of proof significant changes have been introduced as, for instance, regarding the depth of inquiry by way of discovery (now to be called disclosure).<sup>30</sup>

On the continent the Netherlands currently witness attempts to reform civil procedure. Unfortunately, the history of procedure, although highly relevant, is not taken into consideration while preparing draft legislation in this area (the only exception being some historical remarks concerning the new rules in the area of *requête civile*). This is immediately apparent when in the explanatory memorandum to the Dutch legislative proposal 26 855 it seems to be implied that an expeditious civil procedure is something which only our modern times require.<sup>31</sup> The inadequacy of this suggestion is immediately proven by the fact that attempts to frame a more expeditious procedure have been made since the birth of the Romano-canonical procedure in the twelfth century. The absence of an interest in the history of procedure is also shown by the fact that some of the measures suggested by the legislator in order to increase expedition are completely in line with measures which have proven to be inadequate in the past. One only has to point to Articles 1.3.2 and 1.3.3 of the draft legislation.<sup>32</sup> In my opinion these Articles put far too much faith in the willingness of the actors involved in the litigation process to speed up litigation. The history of procedure immediately shows that such faith is not justified. Additionally, the history of procedure makes it clear, that in particular measures aimed at speed but which at the same time leave the judge the possibility disregarding these rules if necessary, are normally ineffective in the long run. Often clauses enabling the judge not to apply these rules are used too enthusiastically. Nevertheless, some of the draft Articles containing crucial rules speeding up the proceedings (e.g. Articles 2.4.8 and 2.4.10)<sup>33</sup> contain exactly such a clause. I think these examples may suffice to

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27. For examples, see W.D.H. Asser, *Rechtsvordering, de geschiedenis voorbij?*, in M.E. Franke a.o. (eds.), *Historisch vooruitzicht. Opstellen over rechtsgeschiedenis en burgerlijk recht*, Arnhem 1994, p. 41–53.

28. Cf. A.A.S. Zuckerman, *Reform in the Shadow of Lawyer's Interests*, in A.A.S. Zuckerman, R. Cranston (eds.), *Reform of Civil Procedure. Essays on Access to Justice*, Oxford 1995, p. 73ff.

29. In his report drafted in order to reform English civil procedure, Lord Woolf only mentions the two most recent reports of the ca. 60 reports which have been drafted in England since the middle of the 19th century concerning aspects of procedure and judicial organisation (cf. M. Zander, *Why Lord Woolf's Proposed Reforms of Civil Litigation should be Rejected*, in A.A.S. Zuckerman, R. Cranston (ed.), *Reform of Civil Procedure. Essays on Access to Justice*, Oxford 1995, p. 79).

30. On the new procedure of disclosure, see e.g. I. Grainger, M. Fealy, *Introduction to the New Civil Procedure Rules*, London/Sydney 1999, p. 42ff.

31. TK 1999–2000, 26 855, nr. 3, p. 7: “Tegenwoordig dienen óók civiele procedures op de eerste plaats vlot te verlopen, willen zij aan de maatschappelijke eisen van de tijd en aan de eisen van een goede rechtspraak voldoen”.

32. Art. 1.3.2: (1) De rechter waakt tegen onredelijke vertraging van de procedure en treft, zo nodig, op verzoek van een partij of ambtshalve maatregelen; (2) Partijen zijn tegenover elkaar verplicht onredelijke vertraging van de procedure te voorkomen. Art. 1.3.3: Partijen zijn verplicht de voor de beslissing van belang zijnde feiten volledig en naar waarheid aan te voeren. Wordt deze verplichting niet nageleefd, dan kan de rechter daaruit de gevolgtrekking maken die hij geraden acht.

33. Art. 2.4.8: (1) Indien geen verschijning van partijen ter terechtzitting op de voet van artikel 2.4.7 is bevolen, geeft de rechter aan de eiser gelegenheid voor repliek te concluderen. Hierna kan de gedaagde voor dupliek concluderen; (2) Is wel een verschijning van partijen ter terechtzitting op de voet van artikel 2.4.7 bevolen, dan wordt aan partijen slechts gelegenheid geboden voor repliek en dupliek te concluderen, indien zulks naar het oordeel van de rechter met het oog op een goede instructie van de zaak noodzakelijk is; (3) De rechter kan het nemen van nog meer conclusies toestaan, indien zulks naar zijn oordeel met het oog op een goede instructie van de zaak noodzakelijk is; (4) ... Art. 2.4.10: (1) Partijen kunnen vervolgens

demonstrate that knowledge of the history of procedure is indispensable for a modern lawyer. The best place to acquire such knowledge and to stimulate some interest in this subject is, of course, the university.

### 3.3 To what extent is harmonisation of civil procedure in Europe a feasible option?

The history of procedure may also play a part in the present debate about the harmonisation of procedural law in Europe. It is, in this respect, worthwhile to make university students aware of the relationships between the different national systems of procedure. From an historical perspective it appears that in Europe at least three procedural legal families may be distinguished. These are the Common Law family, the Germanic family and the Romanistic family (I will not here discuss a possible fourth family – the Nordic family). Due to their indebtedness to the Romano-canonical procedure, the Germanic and Romanistic families may where necessary for purposes of convenience be grouped together in one family. When I do this in the present paper, I will use the common denominator “Continental family of procedure”.

If we contrast the Common Law family with the Continental family, considerable differences appear. Most of these differences are the result of the historical sources from which these two legal families have evolved. It is a known fact that Roman Law was much less influential in England than on the European continent. When the reception of Roman law started, England was already in the possession of a relatively modern system of law, the Common Law. The Common Law knew its own system of litigation in which questions of procedure and substantive law were interwoven to a considerable degree. This so-called writ system was completely different from the Continental European system of procedure based on Roman-Canon Law.

If this had been the complete story, our only conclusion would be that the situation in the Common Law family differs so much from the situation on the Continent, that harmonisation is not a feasible option. Fortunately, other developments in England suggest that there may be similarities between the various procedures. First, England was influenced by the Romano-canonical procedure through the procedure in Equity. Originally, Equity was administered by the Chancellor of the English King who was usually a member of the clergy. As a result the Chancellor was familiar with the Romano-canonical procedure and this has considerably affected Equity procedure as administered in Chancery.<sup>34</sup> The learned procedure was also present at other courts than Chancery, notably at the Court of Admiralty. It would be the procedure of these courts that, next to the rules of procedure at Common Law, was going to have a preponderant effect on modern English procedure.<sup>35</sup> This is the case because England witnessed the introduction of a completely new procedure in the second half of the 19th century (Judicature Acts of 1873–1875). The new procedure applied both at Common Law and in Equity and contained many elements from the procedure in Chancery and from the Court of Admiralty. Additionally, the Code of Procedure for the State of New York (the so-called Field code) may have influenced the new English procedure. For reasons which cannot be expounded here, the Field Code was inspired by the Romano-canonical procedure.<sup>36</sup> As a result, elements of the Romano-canonical procedure were introduced in England and it is precisely these elements which link English procedure to the procedures on the European continent.<sup>37</sup>

The Romano-canonical procedure also lies at the base of the similarities of the systems of procedure

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gelegenheid voor pleidooien vragen. Indien in de zaak een verschijning van partijen ter terechtzitting op de voet van artikel 2.4.7 heeft plaatsgevonden, wordt, behoudens bijzondere omstandigheden, geen gelegenheid voor pleidooien toegestaan. In andere gevallen kan gelegenheid voor pleidooien ter voorkoming van onredelijke vertraging van de procedure worden geweigerd. ... (2) ...

34. Cf. R.C. van Caenegem, *History*, p. 61.

35. W. Holdsworth, *A History of English Law* XV, London 1965, p. 132ff.

36. See D.S. Clark, *The Civil Law Influence on David Dudley Field's Code of Civil Procedure*, in M. Reimann (ed.), *The Reception of Continental Ideas in the Common Law World (1820–1920)*, Berlin 1993, p. 63–87 and my inaugural lecture *Adam, ubi es?*

37. An example is the availability of counterclaims in English civil procedure. Such counterclaims are ultimately derived from the Romano-canonical procedure.



which belong to the Germanic and Romanistic legal families (both being part of the Continental family of civil procedure). Procedural differences between these two families are often the result of the contribution of indigenous law to the procedure in the respective families. In the Romanistic legal family the influence of indigenous law was considerable. All procedures in this legal family are ultimately based on the French Code of Civil Procedure of 1806 and, as we have seen above, this code incorporated the French 1667 Ordinance on procedure. The 1667 Ordinance was itself a codification of earlier French practice. This practice differed from Romano-canonical practice in various ways, notably because of its emphasis on the oral element in the proceedings, whereas the Romano-canonical procedure was mainly a written procedure. As a result of the Napoleonic expansion, the French 1806 Code was introduced in several other European countries. The lasting influence of this Code in these countries resulted in a situation where in many parts of Europe a French type of procedure with an emphasis on oral elements may still be recognized. Only in the Netherlands, it seems, these oral elements have slowly disappeared in practice.<sup>38</sup> This is surprising since the Dutch Code of Civil Procedure was, especially at the time of its introduction in 1838, to a large extent a translation of the French Code (the latter Code having been in force in the Netherlands until 1838). Even the so-called “typical Dutch additions” may have been of French origin. This was a consequence of the fact that the Dutch elements had been derived from the procedures of the Dutch Republic, which themselves had been based on the procedures in the Habsburg and Burgundian Netherlands.<sup>39</sup> These procedures were deeply influenced by 15th and 16th century French examples.

The situation was different in the countries which are a member of the Germanic family of civil procedure. In the German speaking territories, the reception of the learned law occurred relatively late in time. One of the channels through which the Romano-canonical procedure was introduced in German secular practice was the *Reichskammergericht* (established at the end of the 15th century). Procedure at this court was more thoroughly Romano-canonical than procedure in France. This is apparent, for example, from the fact that German procedure was very much a written procedure until well into the 18th century. Only when certain German territories started to reform their procedure did this situation change. An early example is the reform of Frederick the Great in Prussia, who did away with many of the traditional elements in the Romano-canonical procedure. This experiment was, however, not successful and in the end the Prussians returned to a more traditional type of procedure.<sup>40</sup> Napoleon introduced his codification in a considerable area of Germany. In the territory lying on the left bank of the Rhine it remained in force after the defeat of Napoleon.<sup>41</sup> As a result, French procedural law exerted considerable influence in the German territories. This is obvious if one studies the *Zivilprozessordnung* of 1877, which was one of the first legislative highlights of Bismarck's Second Empire, constituted in 1871. It is a single Code of Civil Procedure for the whole of Germany. The ZPO introduced a procedure with strict time-limits and an emphasis on the oral element in litigation.<sup>42</sup> Nevertheless, German procedure remained distinct from the procedures of the Romanistic legal family. The oral element in the procedure, for example, quickly became less preponderant.

As stated above, knowledge about the differences and similarities between the various procedural systems in Europe would be of great help for a possible harmonisation of the law of procedure. At the moment the differences between the various national systems of procedure seem bewildering, but grouping these different procedures together in legal families with the aid of legal history immediately puts some order in the apparent chaos. In my opinion, future lawyers need a university training in these differences and similarities in order to be better able to build the future of procedural law in Europe.

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38. Asser-Vranken, Zwolle 1995, p. 11.

39. The procedural ordinance of the Supreme Court of Holland and Zeeland, for example, was a nearly literal copy of the procedural ordinance of the Great Council of Malines (the former ordinance may be found in A.S. de Blécourt, N. Japikse (eds.), *Klein Plakkaatboek van Nederland*, Groningen-Den Haag 1919, p. 144–175, whereas the latter ordinance has been printed in J. Bolsee (ed.), *L'ordonnance du 8 Août 1559 réglant le statut, le style et la manière de procéder du Grand Conseil de Malines* (texte néerlandais), in *Handelingen van de Koninklijke Commissie voor de uitgave der oude wetten en verordeningen van België* XXIV (1969–1970), Brussels 1971, p. 77–152).

40. On the reform of Frederick the Great, see Millar, *The Formative Principles*, p. 17ff.

41. Millar, *The Formative Principles*, p. 53.

42. Millar, *The Formative Principles*, p. 53.

#### **4. Final remarks**

I hope to have demonstrated that the history of civil procedure deserves a place in the curriculum of the law faculties. Of course, in this paper I have only been able to discuss a few examples where knowledge of the history of procedure is essential for modern lawyers. I do, however, think that these examples concern very important procedural issues. More than technical details of procedure, which can better be studied outside the university, the examples I have given in this paper merit academic attention. This appears explicitly when taking into consideration my first example. We still do not have a clear picture of the reasons underlying the problems as regards the expedition of civil procedure. This is surprising when one realises that this subject has been the focus of attention for at least eight centuries. Nevertheless few improvements as regards the expedition of litigation have been introduced. What are the reasons underlying this apparent failure? Could it be due to the fact that this issue has only rarely gained academic attention? Could it be due to the fact that today's lawyers have not been trained into studying the antecedents of their present system of procedure? It seems that students of procedure do not adhere to the common wisdom that man should learn from his earlier mistakes. The university is the natural place to initiate a change in this attitude by making future students of procedure aware of the importance of legal history in the area of procedural law. Additionally, it should go without saying that the history of procedure is a natural subject in the university curriculum in an epoch where the creation and proper functioning of the European internal market is high on the agenda. Procedural diversity hinders the functioning of this market and therefore harmonisation of the European laws of procedure is required. One should make use of the shared European past which (also) exists in the area of procedure. The history of procedure shows us the origins of similarities and dissimilarities between our various procedures. Legal history makes the relationship between the different procedures in Europe clear. Knowledge about this subject is important for all future lawyers. After all, they will most likely be operating in a European market where national boundaries have lost much of their importance.